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IN THE

Supreme Court of the United States

October Term 1967

No. 1052

ROBERT E. BOEHME,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN OPPOSITION

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Date: March 25, 1968.

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Judgment and Sentence to not more than 20 years for the crime of Assault in the First Degree (as defined by Revised Code of Washington, 9.11.010, Appendix C hereto) in the Superior Court of the State of Washington in, and for, Pierce County was entered on March 15, 1966 (Petition, pp. A-1 to A-2), without a written opinion, upon the unanimous verdict of the Jury on February 6, 1966, after the Motion for a New Trial was denied on March 9, 1966.

The opinion of the Supreme Court of the State of Washington, *en Banc,* unanimously affirming that Judgment and Sentence on July 18, 1967, is reprinted in Appendix A hereto, and is reported in 430 P.2d 527, 71 Wash. Dec. 2d 609. A Petition for Re-

hearing was denied on December 8, 1967. The Remittitur is dated December 14, 1967 (Petition p. A-24).

A Stay of Judgment was denied by the Supreme Court of the State of Washington. This honorable Court also denied a Stay on December 14, 1967, and Petitioner is now in prison in the State of Washington.

JURISDICTION

Petitioner is invoking (Petition p. 2) the jurisdiction of this honorable Court pursuant to 28 U.S.C. § 1257 (3):

> ". . . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . . "

because Petitioner is asserting title, rights, privileges and immunities under the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution (Petition, p. 2):

Petitioner has noted also (Petition, p. 2):

> "the rules of this Court under which the Petition lies are Rule 19, providing for Certiorari to the State Courts; Rule 22, allowing a petition to review a judgment of a state court to be filed within 90 days after the final entry of such judgment; and Rule 23 prescribing the form and contents of the petition."

QUESTIONS PRESENTED

1. In a criminal prosecution of a husband for the attempted murder of his wife, are the rights of either of them, under the Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United

States, or their Right to Privacy, violated by the trial Court's requiring the doctors to testify to her symptoms, and to their treatment of her, when both the husband and wife object to such disclosures at his trial?

2. Is it a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States for a Washington State Trial Court to permit a Medical Examiner from Maryland to testify to the analyses of the wife's blood after tests run partly by him, partly by his chemist under his direction, and partly by others in the presence of that chemist?

3. When an Information charges an attempted murder by "poison or other destructive or noxious thing", and by pre-trial particulars Petitioner is informed that it was done by injection into a named part of the body, is it a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States to permit testimony about another way, and another part of the body when that was not known by the State until trial?

4. On the record here, was Petitioner deprived of his right to a fair trial under the Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution of the United States, and under this honorable Court's decision in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (June 6, 1966)?

5. Where a witness for the State, who was a mistress of Petitioner, and whose testimony goes to motive of the attempted murder of Petitioner's wife by

him, testifies that no charges on other unrelated matters are pending against her in another County, and Prosecuting Attorney of our County so states so far as he knows, and witness has corroboration (letters from Petitioner) for some of her testimony, have Petitioner's rights under the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States been violated when it later develops that there were in fact such charges pending, which, since Petitioner's conviction, have been dismissed?

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The constitutional privisions under which Petitioner claims title, rights, privileges and immunities are the following Amendments of the Constitution of the United States: the Fourth, Fifth, Sixth, Ninth and Fourteenth. Also involved is the Constitution of the State of Washington, Art. 1, § 2, (Amendment 10). All these constitutional provisions are reprinted in Appendix B.

The Statutes of the State of Washington here involved include the following provisions of the Revised Code of Washington (RCW): 5.45.020; 5.60.060, subds. 1 and 4; 9.11.010; 10.52.020; 10.55; 10.58.010. All these statutory provisions are reprinted in Appendix C.

RULE OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON INVOLVED

The Rule of the Superior Court of the State of Washington involved was Rule 101.04W, subd. 2, of

the Rules of Pleading, Practice, and Procedure (RPPP), which, effective July 1, 1967, is now Rule of Criminal Procedure (Cr. R.) 101.04 W, subd. b.

This Rule, past and present, is reprinted in Appendix D.

COUNTER-STATEMENT OF THE CASE

In accordance with this honorable Court's Rule 40 (3), the State submits the following Counter-Statement.

Petitioner, a medical doctor, was charged by Information, with attempting to murder his wife, "by poison, or any other destructive or noxious thing" (Tr. 1). After a trial for 2 weeks, he was convicted by a Jury, and sentenced to not more than 20 years (Petition, p. A-1 et seq.).

Most of the State's evidence consisted of the testimony of medical witnesses.

Dr. Strehlow, a general practitioner, who spends all of his time in internal medicine (St. 245), and who, for 3 years had been the victim's physician, she generally enjoying good health (St. 246), was called by Petitioner about midnight on June 29, 1965 to come to a hospital in Bremerton (Kitsap County). He found Petitioner's wife there in the emergency room "drifting in and out of a coma". Petitioner told him a heavy beam had fallen on her head. She was "too critical to be examined completely" (St. 246-247). Neither X-rays, nor the outside of her head, showed any injury. He did a spinal tap; fluid discharged un-

der pressure (St. 248, 1058), and it was bloody. Her condition was critical. That doctor ordered an ambulance to take her to a Tacoma (Pierce County) hospital "as rapidly as possible" (St. 249), and for a Dr. Durkin, a neurologist and neuro-surgeon, to meet her there. Petitioner rode in the ambulance with his wife (St. 852-854).

Dr. Durkin met the ambulance at 1:30 a.m.; he was puzzled by her symptoms; she was semi-comatose; her respiration was poor; her abdomen was hard as a board; muscles all over her body were "jumping"; the only evidence of any blow was a small abrasion across the right side of her neck (St. 255-259).

No medication was given; no surgery was done. At about 3 a.m. she stopped breathing momentarily, and a respirator was used on her a few minutes later (St. 761). At 5 a.m. she was having trouble breathing; she was breathing about 4-8 times a minute; she was "deeply unconscious", responded to no stimuli (St. 762-763). By 8 a.m. her rate of breathing was worse, so a tube was inserted into her windpipe so the automatic respirator would work efficiently (St. 264, 764); she was "very, very close to death" (St. 763-764); she had "less than a half an hour" to live if it were not for the automatic breathing machine (St. 764). The machine did "all the breathing for her" (St. 764). Her pupils were "very, very widely dilated"—"something you see rarely except under the influence of certain drugs or when a patient is about to die" (St. 764).

Petitioner had gone home while much of this was

occurring, to care for his own patients (St. 265); Dr. Durkin had been checking the victim's condition by telephone every 15-20 minutes (St. 264). When Petitioner came to the hospital about 8 a.m., he was told there was not much "hope that she would live through this" (St. 264).

However, by 9:30 a.m. she was improving (St. 1006); and by 1:30 p.m. she could breathe by herself, her abdomen was not so hard, and her pupils were less dilated (St. 265). At about 2 p.m. she was connected to an "I.V." bottle of glucose which would empty in about 12 hours (St. 664-665). By 7:45 p.m. she could talk, and coherently, had relatively normal reflexes, and the windpipe tube was removed (St. 265-266; 267-268). He then called Petitioner, said she had "suddenly, suddenly, magically come out of a very bad situation", and that "she looked like she was going to make this without any problem" (St. 268); so about 9 p.m. Dr. Durkin went home (St. 268). Five minutes later her special nurse (Otto) left her with a senior student nurse (Yates) (St. 357, 374). About 5 minutes after that Petitioner came into the room. He asked the student nurse how his wife was; he was told she was "improving or she was responding"; he asked if he could be alone with his wife for a few moments, and she agreed (St. 375, 376). She returned in a few minutes after reporting it to her charge nurse (Wold; St. 376). His right hand, closed, was on the bed by his wife's buttocks (St. 378); he put his hand into his pocket, took his hand out, and put it on her hip, on top (St. 378), with his hand open this time

(St. 378). He asked if he could be with his wife a few moments longer, and the student nurse said "yes, reluctantly" (St. 377); and he leaned over and kissed his wife (St. 378); she left the room, reported it to the charge nurse, and they returned, and entered the room in about 3 minutes (St. 379).

The Petitioner "left right away", and "didn't say anything before leaving" (St. 379).

She examined her patient in the presence of her charge nurse (Wold) and her instructor (Abbott); on the victim's right buttocks "there was a droplet of blood and it appeared to be oozing from an injection site" (St. 379). She left the room to get the emergency rescusitator, met Dr. Pratt, an anethesiologist, in the hall (St. 379), "told him that Mary had gotten worse, and would he please go in the room" (St. 380).

Dr. Pratt went into the room saw that "she was dying", he used emergency steps to restore breathing (St. 325-327); her eyeball did not respond to touch, there was no response to light, abdomen was rigid, and there was twitching in her fingers and toes (St. 329). Nurse Otto saw the blood from the puncture in the buttocks (St. 360), and so did Dr. Pratt (St. 331); he "ordered an immediate blood sample to be drawn", and it was done in his presence (St. 329).

At 9:30 p.m. Dr. Durkin received "a frantic phone call from the nurse"; he returned to the hospital within 7 minutes (St. 269), and found his patient "dying". "She was not breathing", but her color was good, and she had the same set of "bizarre" symptoms

she had the night before in the emergency room (St. 269-270-274). He examined her, found the fresh blood on her buttocks; her abdomen "was board hard"; and she "had no reflexes anywhere" (St. 270). He realized then "I was not dealing with a head injury but my patient had in some manner been poisoned" (St. 270). He then called in for consultation other medical specialists: in internal medicine, pathology, toxicology, and a bio-chemist (St. 273-274). There was general agreement that she had been poisoned (St. 1061, 1043, 1073, 1044, 1062).

Dr. Pratt testified that he was "probably an expert in recognizing poisoned patients" (St. 1063), because he was a doctor and anesthesiologist of 20 years' experience with "probably over 100,000 patients that have been poisoned under controlled conditions" (St. 1062); in his opinion, "she had been poisoned with some exotic type of poisoning" (St. 1061).

Dr. Dean, a physician and anesthesiologist, who had examined her also, testified that if the symptoms she had were from a head injury, "her brain would have turned to mush" (St. 1073).

One other expert testified for the State, based only on the records, that she had been, in his opinion, poisoned (St. 1114).

The Petitioner's expert, with distinguished training and experience (St. 903-908), was from California, and was limited necessarily, therefore, to opinion evidence; he said her symptoms were attributable to a "serious heady injury" (St. 949).

The blood and urine samples, and the "I.V." bottle were all, analyzed.

The urine sample contained free Promazine (St. 499), which is one of "the more potent tranquilizing agents" (St. 499).

The "I.V." glucose bottle, into which a hypodermic needle could be injected while the bottle is still connected to the patient (St. 720-722) was analyzed, and it, too, contained Promazine (St. 699). This was the bottle which Petitioner, at trial, admitted he had "handled" while he was alone with his wife (St. 827-828).

The blood samples were analyzed by Dr. Petty, a Maryland specialist, and his assistant, Mr. Orindorff, a chemist. He concluded that a poisoning agent in the blood had interfered with an ingredient in the blood which is essential to transmit nerve impulses (St. 515-517); and without that ingredient functioning properly, "proper movement of the muscles would not be possible" (St. 517).

Petitioner testified on his own behalf.

He said a plank fell on her head while they were in the boathouse (St. 807). He immediately gave her in the right hip (St. 861), a morphine injection (St. 810), though she had been knocked out at first by the plank (St. 808), and morphine should not be given to unconscious people (St. 861-862). The dilation of her eyes was because he had to get her contact lenses out by floating them off with some liquid from a nearby eye bottle at the emergency room of the first (Brem-

erton) hospital (St. 812), and it had the wrong solution (St. 812), which made her eyes dilate (St. 812).

It should be noted that a nurse, on rebuttal, saw him remove the contact lenses, saw no eye-tray, and said he put no drops in her eyes (St. 1147-1148).

Petitioner said his wife had serious emotional problems (St. 780-790) and he had been giving her a tranquilizer called Sparine; and she had taken too many of them the day the plank fell on her (St. 780-790).

He wanted to be alone with her in the hospital room so they could pray together (St. 826), and so he could give her an injection of Ritalin in the right hip (St. 826), and that was as "an antidote" for the too much Sparine he thought she had taken (St. 826).

His wife was insured for $173,000 (St. 855-856) and he was the beneficiary (St. 855).They had funds, however; they had recently purchased a $38,000 boat (St. 860); and a year before this near-death, he had taken 17 friends and relatives to Hawaii (St. 996).

One of his patients, a Wanda Ostby, testified that, while she was still married, she had an affair with Petitioner (St. 172-180), and that, for a time they were meeting almost every Thursday night (St. 177); that Petitioner had told her that "Mary would never give him a divorce" (St. 179); that "he had no doubt that Mary would strip him of everything" (St. 179); that he would "take care of Mary" (St. 180, 181); that he then "grabbed" her arm, and asked, "You little fool, don't you understand what I am trying to tell you?"

Petitioner interrupted to say that she was "committing perjury" (St. 179).

When he testified in his own defense, he admitted she was a patient (St. 832); he admitted giving her money as a matter of charity (St. 837); he never had any other relationship with her (St. 835).

He admitted receiving letters from her (St. 839); "she was a pest, but I did my best" (St. 839). He admitted writing her 6-8 letters while she was in California (St. 839). He admitted that Ex. 49 (St. 840), was apparently in his handwriting and it said "Destroy all mail" (St. 841). She did not. When confronted with some of his messages to her (Exs. 49, 50, 51, 52; St. 839-845), he admitted he had seen her not once, but rather 3-4 times in California (St. 845); and he admitted that, although "Morality is a matter of degree" (St. 899), he had had relations with her some number of times (St. 899); that the reason he had not been frank either on the stand or to his counsel was:

> "Because I was ashamed to admit that I had been having an affair with a town prostitute and because I wanted to spare my family that indignity and because in 17 years of practice trying to do what I could. . . . (St. 900).

And he denied, again, that he, in any manner, ever intended to hurt his wife (St. 901).

ARGUMENT AS TO ISSUE I

Petitioner, who was a licensed physician, is suggesting (Petition, p. 3, 11, 13) that he was denied his rights under the Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States by the trial Court's (1) permitting the State to try

him for the attempted murder of his wife, and (2) compelling the physicians who treated the wife and rescued her from the brink of death from poison, to disclose to the Court and Jury the communications of the wife-victim-patient to them—in both instances, Petitioner suggests, thus violating the constitutional Right of Privacy between doctor-husband, wife-victim-patient, and her rescuer-doctors.

As this honorable Court has noted recently:

> ". . . . . Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

See: *Katz v. United States,* .... U.S. ....., 88 S. Ct. ...., 19 L. Ed. 2d 576, at 581, n. 5 (Dec. 18, 1967).

Petitioner cites no authority directly in point for his position. Since no crime by husband against wife was involved in them, recent decisions of this honorable Court implementing the Rights of Privacy cannot be wrenched into support for his position. See: *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (June 7, 1965); *Poe v. Ullman,* 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (June 19, 1961), rehearing denied 368 U.S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (Oct. 9, 1961).

In the recent words of Mr. Justice Harlan, Petitioner's suggestion would appear to be "one savoring of a disingenuous constitutional contention". See: *Smith v. Illinois,* .... U.S. ...., 88 S. Ct. ...., 19 L. Ed. 2d 956, at 961 (dissenting, Jan. 29, 1968).

Questions of marital privilege, and doctor-patient privilege are, of course, constitutionally a matter of State concern. In the State of Washington that concern, and the judgments concerning it, are all expressed in the Statutes, RCW 5.60.060, subd. 1 and 4; and RCW 10.52.020, which are, by RCW 10.58.010, applicable to criminal actions "so far as practicable", as well as to civil actions. These statutes are set out in the Appendix C hereto.

These statutes were considered by the Supreme Court of the State of Washington and were interpreted as unavailing in this setting. Accord: *Annotation,* 2 ALR 2d 645, at 647; see and compare, *Annotation,* 7 ALR 3rd 1458.

Petitioner would appear, therefore, to bottom his position on the fact that his wife has asserted his innocence, and that she, as well as he, of course, objected to his prosecution for his attempted murder of her, assuming, apparently that they, together, rather than the State, "own" this case. Petitioner would gloss over the view that attempted murder of a woman, albeit one's wife, is an act, in the words of the Criminal Information, "against the peace and dignity of the State of Washington." In even less serious situations than the one at Bar, the Supreme Court of the State of Washington has long recognized that:

> "The case, after the complaint is filed, is no longer a matter of private concern, but has partaken of all the attributes of a public offense, and the injured spouse should have no more right to control the further disposition of the case than should the complaining witness in any other criminal action.

See: *State v. Astin,* 180 Pac. 394, at 394, 106 Wash. 336, at 337, 4 ALR 1335, at 1336 (Apr. 3, 1919); noted in Wharton, Criminal Law (12th ed.), § 2094; 69 Yale L. J. 556; and *State v. Camp,* 430 P. 2d 187, at 187, 71 Wash. Dec. 2d 607, at 608 (*per curiam,* July 13, 1967). See, and compare, Comment, *Marital Privileges and the Right to Testify,* 34 Univ. of Chicago L. Rev. 196-210 (No. 1, Autumn, 1966).

The State knows of no doctrine, constitutional or otherwise, rendering this view impermissible.

ARGUMENT AS TO ISSUE II

Petitioner is suggesting (Petition, p. 3, 11, 13-16) that he was deprived of the right guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States to be confronted by the witnesses against him, when the trial Court admitted into evidence against him the results of certain chemical tests.

There is no merit to this suggestion.

At the threshold Petitioner must acknowledge that this honorable Court does not

> ". . . . . sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, providing that none of them infringes a guarantee in the Federal Constitution."

See: *Burgett v. Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319, at 324 (Nov. 13, 1967). In an earlier day, Mr. Justice Cardozo, speaking for this honorable Court also acknowledged this view that each State

". . . . . is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

* * * * *

"Nor has the privilege of confrontation at any time been without recognized exceptions, * * * The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule."

See: *Snyder v. Massachusetts,* 291 U.S. 97, at 105, 107, 54 S. Ct. 330, 78 L. Ed. 674, at 677, 679, 90 ALR 575, at 579, 580 (Jan. 8, 1934). Accord: *Kay v. United States,* 255 F. 2d 476, at 480-481 (USCA-4, May 17, 1958), cert. denied, 358 U.S. 825, 79 S. Ct. 42, 3 L. Ed. 2d 65 (Oct. 13, 1958), where that Court noted:

"Neither the Sixth Amendment to the Constitution of the United States, nor Article I, Section 8 of the Constitution of Virginia can be said to have incorporated the rule against hearsay evidence, as understood at the time of their adoption. Each was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.

"The power of the Congress and of a state legislature to provide for the admission of evidence is not subject to any such arbitrary limitation as the defendant supposes. They may carve out a new exception to the hearsay rule, without violating constitutional rights, where there is a reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under the long established exceptions to the hearsay rule." (255 F. 2d at 480-481).

See and compare: Hon. Talbot Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 ABAJ 231 (March 1968), suggesting that any "rule with thirty-two (or more) exceptions is no rule"; see, however, Note: *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 Univ. of Pa. L. Rev. 741 (March 1965).

In the case at Bar the testimony to which Petitioner takes such exception was given by a Dr. Charles S. Petty, who, at the time of the trial (January-February 1966) was, and since July 1958 had been, Assistant Medical Examiner for the State of Maryland in Baltimore, and was an Associate Professor for Forensic Pathology at the University of Maryland School of Medicine, and an assistant in the John Hopkins University School of Hygiene and Public Health (St. 513 N).

For 3 years before that (1955-1958) he was Instructor, and then Assistant Professor, in Pathology at the Louisiana State School of Medicine in New Orleans, and at the same time was the pathologist or coroner for the Parish (County) of New Orleans (St. 513M-513N).

His education and training was as follows: 1941 Graduate in Pharmacy from University of Washington; after World War II, in 1946, came back to receive an M.S. in Physiology; graduated from the Harvard Medical School in 1950; interned at Cooperstown, New York, for 2 years; then he became Chief Resident Pathologist at Peter Brigg Memorial Hos-

pital in Boston; then, also, at Children's Medical Center in Boston; and, finally, Senior Resident in Pathology at The New England Deaconess Hospital in Boston (St. 513M).

That Dr. Petty testified that

> ". . . . . part of certain tests were performed by me, and part of that [sic] same tests were performed under my supervision by my own personnel." (St. 521).
>
> * * * * *
>
> ". . . . . I personally performed part of the analysis, but generally speaking what I did was to see to the layout of the test procedure, to watch for the proper pipetting, or measuring of the test materials, and reactions, and then to follow the test results as they were developed. (St. 523).

Dr. Petty testified that part of the tests were done by one of his employees (Orindorff) who has a Bachelor's degree in Chemistry, with certain credits toward a Master's, and was currently working toward a Doctor's (St. 645); he had been his employer for about 3½ years (St. 537).

Dr. Petty further testified that some of the tests were run on specialized equipment (St. 535), owned by the United States Government (St. 645) at the U.S. Army Chemical Center at Edgewood, Maryland (St. 523, 535), with which, for about 10 years, Dr. Petty and his assistants had a contractual relationship (St. 535)—as he puts it—

> ". . . . . we analyze with them, and they analyze things for us, and we analyze things together." (St. 536).

and the technique used in the laboratory "is perfectly reliable" (St. 536).

Dr. Petty acknowledged that he personally had not operated this equipment since about 1962 (St. 538), but he had received a control sample from the machine (St. 538); his assistant (Orindorff) had watched the tests while they were being run, took the information received, returned "directly" to Dr. Petty's office, and discussed it with Dr. Petty (St. 539).

Dr. Petty had some notes about this at the trial, and he used them to refresh his recollection as to the test results (St. 520). See: *Goings v. United States,* 377 F. 2d 753, at 755, hdnt. 12 (USCA-8, April 24, 1967).

Under all these circumstances, the State suggests that it was not error for the trial Court to admit the testimony of Dr. Petty.

Citing McCormick, Evidence § 15 (1955), and 3 Wigmore, Evidence § 688, (3rd ed. 1940), the United States Court of Appeals for the District of Columbia in *Jenkins v. United States,* 307 F. 2d 637, at 641 (on rehearing, in Banc, June 7, 1962) considered that

> ". . . . . the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession." (307 F 2d at 641; ftnt. omitted).

The United States Court of Appeals for the Eighth Circuit has indicated:

> ". . . . . With the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the court room."

See: *Birdsell v. United States,* 346 F. 2d 775, at 779-780 (May 17, 1965), rehearing denied (July 8, 1965), cert. denied, 382 U.S. 963, 86 S. Ct. 409, 15 L. Ed. 2d 366 (Dec. 13, 1965), rehearing denied, 383 U.S. 923, 86 S. Ct. 900, 15 L. Ed. 2d 680 (Feb. 21, 1966), rehearing denied 384 U.S. 914, 86 S. Ct. 1347, 16 L. Ed. 2d 368 (April 18, 1966).

The Washington State Supreme Court has ruled that the admission of test results is discretionary with the trial Court, so long as the records were made "in the regular course of business", even if the witness did not personally conduct the tests, because, our Court held, "such a record is presumptively reliable" when it is "made under circumstances which the Court finds rendered it trustworthy", and "there was no apparent motive to falsify." See: *State v. Rutherford,* 66 W. 2d 851, at 852-855, 405 P. 2d 719, at 720-722 (Sep. 16, 1965), rehearing denied (Nov. 2, 1965), appeal dismissed and cert. denied, *per curiam,* 384 U.S. 267, 86 S. Ct. 1477, 16 L. Ed. 2d 525 (May 23, 1966).

For other decisions upholding the admissibility of records, in the face of a challenge of the Sixth Amendment, see: *United States v. Kelly,* 349 F. 2d 720, at 770-771 (USCA-2, July 29, 1965, opinion by Senior Circuit Judge Medina, with Moore, C.J. and the now Mr. Justice Marshall), cert. denied, 384 U.S. 947, 86 S. Ct. 1467, 16 L. Ed. 2d 544 (May 16, 1966; Mr. Justice Douglas voted to grant the Petition); *McDaniel v. United States,* 343 F. 2d 785, at 789 (USCA-5 Apr. 7, 1965), rehearing denied (May 11, 1965), cert. denied 382 U.S. 826, 86 S. Ct. 59, 15 L. Ed. 2d 71 (Oct. 11, 1965).

It should also be noted that Petitioner could have, himself, obtained the compulsory attendance of the chemist (Orindorff) upon whose absence this point is predicated. See: Washington State Constitution, Art. I, Sec. 22 (amendment 10), reproduced in Appendix B; RCW 10.55, Witnesses Outside the State (Uniform Act), reproduced in Appendix C; 9 U.L.A. p. 86, and 1966 Cumulative Annual Pocket Part, p. 49, indicating that that witness's State (Maryland) had adopted the Uniform Act, (since 1955). See also: IV Martindale-Hubbell (Law Digests), 1967 ed. p. 3724 (p. 3682 in 1966 ed. when case at Bar was at trial). See also: *Annotation,* 44 A.L.R. 732.

Dr. Petty's testimony began on Friday, Jan. 28, 1966 (St. 494; 513 L), and was concluded on Monday, Jan. 31, 1966 (St. 660); he returned and testified again on Saturday, Feb. 5, 1966 (St. 1079; 1115) and concluded on that same day (St. 1140), the day the case went to the Jury. There is nothing in the record, however, indicating any attempt by Petitioner to use the compulsory-attendance-of-witnesses provisions of our State Constitution and the Statute, RCW 10.55, as to Orindorff during any of this period.

ARGUMENT AS TO ISSUE III

Petitioner is suggesting (Petition p. 3, 12, 16-17) that his rights under Amendments Six and Fourteen to the Constitution of the United States were violated because he was denied his right to know what he was charged with, with sufficient notice, and with sufficient time, to prepare his defense, because the trial Court

allowed the prosecution to amend the Information.

There is no merit to this suggestion.

Petitioner, as a defendant in a case charging him with an attempt to murder his wife by poison, misapprehends his rights as to the contents of the Information.

This honorable Court has long recognized that the Information need *not* allege the *mode* of the administration of the poison. See: *Westmoreland v. United States,* 155 U.S. 545, at 549, 15 S.C. 243, 39 L. Ed. 255, at 256 (Jan. 7, 1895, unanimous), ruling:

> "The indictment need not specify in detail the mode in which the poison affected the body, or the particular organ upon which its operation was had."

In that case this honorable Court also indicated that

> "At common law, though it was necessary to allege the kind of poison administered, nevertheless proof of the use of a different kind of poison was regarded as an immaterial variance." (155 U.S. at 549).

Simile: *Carter v. State,* 2 Ind. 617, at 618 (Sup. Ct., May Term 1851, *per curiam*). Both cases are noted in 2 *Warren on Homicide,* § 175, pp. 63-65 (Buffalo, N.Y., 1938).

Apart from this, however, the Information (Tr. 1) was *not* amended. The Information charged that Petitioner "did administer to or cause to be taken by" his wife a "poison or other destructive or noxious thing." On the trial Court's Order for Answers to Petitioner's Interrogatories, the State said the poison

was administered by injection "in the general area of the buttocks" (Tr. 7).

Petitioner, *during trial,* volunteered that he had injected a substance into his wife's hip (St. 826); and, further, that he had handled a bottle connected to her arm (St. 828). The State learned, *during trial,* that the bottle, while connected to the wife-victim's arm, had been contaminated by an injection of poison (St. 698-699). That bottle, and testimony about its contents, were offered and received into evidence (St. 697, 720-722, 699, 827-827). No objections were made, on the ground of variance between pleading and proof, at the time of its offer, or concerning Instructions referring to it.

The Superior Court Rule (promulgated by the Supreme Court of this State) Rule 101.04W, subd. 2, now Cr. R. 101.04 subd. b (Appendix D), permits amendment of an Information during trial, or considers an Information amended to conform to the proof admitted without objection. The trial Court here ruled that no formal amendment to the Information would be required (St. 1155, 1156-1157).

In this whole context, petitioner was not misled, nor disadvantaged, and, if he had been, he could have, and should have, applied to the trial Court for "such order as will secure to the defendant full opportunity to defend" (Rule 101.04W, subd. 2; Appendix D). Accord, the recent *Annotations,* 17 ALR 3rd 1181; and 17 ALR 3rd 1295.

ARGUMENT AS TO ISSUE IV

Petitioner has suggested (Petition, p. 3, 12, 17-18) that there was extensive pre-trial publicity as to this case; that his jurors had to pass through a hostile mob each day in the Courthouse hallways; that the press had allocated to it a specific group of seats — that all these matters violated his rights to a fair trial under the Fourteenth Amendment to the Constitution of the United States. The facts, whether in, or out of, the record, simply do not support these assertions.

The State would only suggest that both the public and the press have an interest in a trial; that the presence of, or availability, of the public and the press at a trial is to some considerable degree a measure of protection to a defendant; that that was the thinking of the framers of our Constitution in requiring that all criminal trials be open to the public and to the press; that both public and the press have a "standing invitation" under our Constitution to be present at a criminal case; that *only* when a Petitioner can demonstrate that public or press conduct in, around, or out of, the Courtroom, has a possible effect on juror, witness, or Court objectivity, can Petitioner fairly question the conditions surrounding his trial; that Petitioner cannot assert prejudice merely because the verdict of the jury matched his fears rather than his hopes.

There was here *no* interference by public or press, in, or out, of the Courtroom. See: *Standards Relating to Fair Trial and Free Press,* A.B.A. Project, Tentative Draft (Dec. 1966).

The public and press interest here was proper—and it simply cannot be equated with any of the circumstances in any of the following cases: *Rideau v. Louisiana,* 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (June 3, 1963); *Annotation,* 10 L. Ed. 2d 1243-1306; *Billie Sol Estes v. Texas,* 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (June 7, 1965), rehearing denied, 382 U.S. 875, 86 S. Ct. 18, 15 L. Ed. 2d 118 (Oct. 11, 1965); *Sheppard v. Maxwell,* 231 F. Supp. 37-72 (Chief Judge Weinman, USDC-ED Ohio, July 15, 1964), affirmed, 384 U.S. 333, 86 S. Ct. 601, 16 L. Ed. 2d 600 (June 6, 1966); and *Jack Rubenstein alias Jack Ruby v. State of Texas,* .... Tex. Crim. ...., 407 S.W. 2d 793, at 795, 795-803 (Ct. of Crim. App., Oct. 5, 1966), rehearing denied (Nov. 16, 1966).

ARGUMENT AS TO ISSUE V

Petitioner has suggested (Petition, p. 4, 12, 18-19) that he was denied his right to a fair trial under the Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution of the United States, because his patient-mistress, testifying against him, testified that there were no criminal (check) charges pending in *another* County against her while she was testifying against him (St. 197, 195), and that the then Prosecuting Attorney of *our* County had so assured the trial Court (St. 191, 192, 193; Supp. St. 71) when, in fact, there were such charges pending, although apparently unknown either to that witness or to the then Prosecuting Attorney of *our* County.

Petitioner's counsel, with candor, in the trial Court, said:

". . . . . I know [the then Prosecuting Attorney] and I do not think that he ordinarily or in any circumstances would have acted this way. (Supp. St. 73-74)."

The facts as to the questioned relationship between Petitioner and the witness-mistress were testified to fully by her (St. 172-178-197); she was carefully cross-examined (St. 184-196); Petitioner, from the counsel table, denounced the witness as "committing perjury" (St. 179), and, from the witness stand himself, under oath, denied that the relationship was anything other than doctor and patient (St. 832-835; 837-839); but finally, when pressed and shown Exhibits 49, 50, 51, 52, which he had asked her to destroy (St. 840-845), he admitted, in open court, to his own counsel, that he did "have an affair" and "have relations" with her (St. 899).

Other Courts have apparently recognized that tangible objects produced by the paramour-witness against a defendant-doctor can help corroborate the essence of testimony unfavorable to the doctor, and going to the issue of motive. See, e.g., *State v. Sheppard,* 128 N.E. 2d 471, at 493-494, 498 (Ct. of App., Ohio, July 13, 1955), affirmed 165 Ohio St. 293, 135 N.E. 2d 340 (Sup. Ct., May 31, 1956), cert. denied, 352 U.S. 910, 77 S. Ct. 118, 1 L. Ed. 2d 119 (Nov. 13, 1956), rehearing denied, 352 U.S. 955, 72 S. Ct. 323, 1 L. Ed. 2d 245 (Dec. 17, 1956) where the gift was a watch.

Whatever her other problems, unknown, or known, to her, her credibility was insured by her possession of the damning Exhibits 49, 50, 51, 52. No constitu-

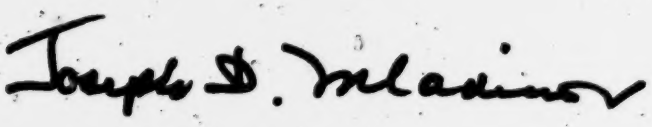
tional attack can be launched from this factual springboard. Cf. *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (June 15, 1959); *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (May 13, 1963); *Giles v. Maryland,* 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (Feb. 20, 1967); *People v. Nash,* 36 Ill. 2d 275, 222 N.E. 2d 473, at 477-478 (Sup. Ct., Dec. 1, 1966), rehearing denied (Jan. 17, 1967), cert. denied, ... U.S. ...., 88 S. Ct. 222, 19 L. Ed. 2d 223 (Oct. 16, 1967), with a dissent by Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, at 19 L. Ed. 2d 681.

While we may be on the threshold of the formulation of a rule as to the duty of the prosecution to provide the defendant with any material bearing on the credibility of important witnesses, consideration of such a rule will have to wait for a factual setting in which it is applicable. This is not the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari in this matter should be denied.

Respectfully submitted,



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Date: March 25, 1968.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38826

En Banc

Filed July 18, 1967

(Reported in 71 Wn. Dec. 2d 609)

THE STATE OF WASHINGTON,
Respondent,
v.
ROBERT E. BOEHME,
Appellant.

Defendant, Robert E. Boehme, a medical doctor, was charged, tried before a jury, and convicted of the crime of assault in the first degree. He appeals. We affirm the conviction.

The offense involved arose out of a purported attempt on the part of defendant to poison his wife, Mary Boehme. The circumstances giving rise to the charge, as revealed by the evidence, lend themselves to the following summary.

At about 9:30 p.m., on June 29, 1965, defendant, Mrs. Boehme, and two other members of the family went to the family boathouse to work on their boat. During the course of the evening, and while defendant and Mrs. Boehme were working at the bow of the boat, a board or heavy plank fell and struck Mrs. Boehme about the head. She was stunned or briefly rendered unconscious and fell to the floor. Upon regaining her senses, she complained of pain, and defendant administered to her by injecting a substance into her hip. Defendant then, with the aid of two members of the family, carried Mrs. Boehme to the family automobile and transported her to a local hospital, the Harrison Memorial Hospital in Bremerton, Washington, and summoned Dr. Benjamin T. Strehlow, a general practitioner, who had treated her

previously. After arrival at the hospital, and before Dr. Strehlow appeared, defendant removed Mrs. Boehme's contact lenses from her eyes. Defendant testified that during this procedure he inadvertently and unintentionally utilized a type of eye drops (isopto atropine) which would cause the pupils of her eyes to dilate.

When Dr. Strehlow reached the hospital he was informed by defendant that Mrs. Boehme had suffered a severe blow on the head, although the only surface manifestation thereof was a slight abrasion in the area of the neck. The doctor was not advised of any medication Mrs. Boehme might have taken during the day, nor of the earlier injection, and of the application of any eye drops. His examination of Mrs. Boehme revealed that the pupils of her eyes were widely dilated and that she was drifting in and out of a coma. The doctor thereupon ordered skull X rays and performed a spinal tap. The X rays were negative as to bone damage; however, the spinal tap indicated a bloody discoloration of and pressure on the spinal fluid. Dr. Strehlow then concluded that Mrs. Boehme was in urgent need of the services of a neurologist and with defendant's participation arrangements were made to transport her by ambulance to St. Joseph's Hospital in Tacoma, for the attention of Dr. Stanley Durkin, a neurologist and neurosurgeon.

The ambulance with Mrs. Boehme, the driver, one attendant, and the defendant reached St. Joseph's Hospital at about 1:30 a.m., June 30, 1965. The ambulance was met by Dr. Durkin. The defendant delivered samples of the spinal fluid removed by Dr. Strehlow and informed Dr. Durkin that Mrs. Boehme had been struck on the head. Again, the defendant neglected or forgot to advise the doctor of any earlier medications. Finding no superficial evidence of a blow to the head, except the neck contusion, Dr. Durkin ordered immediate skull X rays. Again the X rays were essentially negative as to skull damage; however, the doctor's physical examination, conducted while Mrs. Boehme was on the X ray table, revealed that she was

then in a deep semicomatose condition, that the pupils of both eyes were widely dilated and fixed, that her abdomen was hard and rigid, that her body muscles were spontaneously twitching and jumping, that deep tendon reflexes were absent, and that respiration was irregular. Proceeding upon a working diagnosis of brain injury, Dr. Durkin placed her in a hospital room under constant observation. Shortly after Mrs. Boehme arrived at her hospital room, and between 2:30 a.m. and 3:15 a.m., extreme respiratory difficulty developed. Artificial respiration, oxygen, and a Byrd respirator, an automatic breathing machine, were applied, the latter by the use of a face mask. Although these steps alleviated the immediate respiratory failure, her condition despite intermediate adjustments of the respirator did not measurably improve and by 8 a.m. her condition was diagnosed as terminal. At this point the Byrd respirator was turned on the fully controlled breathing cycle and connected to a tracheal tube leading directly into her windpipe. A second spinal tap was also made and again revealed discoloration of and pressure on the spinal fluid. The defendant was advised that her condition was very critical. Having patients of his own to care for, the defendant returned to his office.

During the course of the day, Mrs. Boehme rallied. Various of her symptoms diminished and her respiration improved to the point where she could breathe without the aid of the automatic respirator. She was placed upon an intravenous solution of glucose and water and, by early evening, her vital signs were such as to permit removal of the tracheal tube and coherent conversation. Dr. Durkin advised defendant he felt she was on the road to recovery.

At about 9 p.m., after Dr. Durkin had visited Mrs. Boehme and found her condition continuing to improve, the special nurse left her in the temporary charge of a student nurse. Shortly thereafter, defendant visited his wife and asked the attending nurse to leave the room. The student nurse complied, but returned to the room in a few minutes at which time

she observed defendant move his hand from the area of Mrs. Boehme's hip to his pocket. Again the defendant requested the nurse leave him alone with his wife, and again the nurse complied. On this occasion, however, the nurse reported the circumstances of her absence to the floor nurse who immediately entered Mrs. Bohme's room. At about this time, the defendant departed. The floor nurse, in company with the student nurse and the special nurse, then observed a fresh hypodermic injection site on Mrs. Boehme's hip. The nurses also noted that Mrs. Boehme was having difficulty in breathing. Dr. Howard Pratt, the anesthesiologist, who had previously removed the tracheal tube for the Byrd respirator, and an intern, a Dr. Kazi, were summoned and upon arrival found Mrs. Boehme in extreme straits. Her earlier symptoms had returned, her respiration was of the terminal type, and the doctors conceived that she was dying. Emergency measures were initiated, the trachea tube was reinstalled and the Byrd respirator reactivated. Dr. Durkin arrived and after consultation with Dr. Pratt and other doctors on the scene it was concluded that her condition was induced or caused by poisoning through the medium of some rare drug. This conclusion was reached upon the basis of the hypodermic injection sites on her hip and because some of her symptoms could not be reconciled with any but the gravest of brain injuries. Blood and urine samples were then taken, the intravenous bottle was detached, and all were sealed, marked for identification, and placed under refrigeration for subsequent analysis.

During the early morning hours of July 1, 1965, Mrs. Boehme again rallied dramatically. From that time forward she improved steadily and was ready for release from the hospital on July 15, 1965.

During the interval between July 1 and July 15, 1965, additional blood samples were taken, marked for identification, and refrigerated. These samples, together with the earlier blood samples were sequen-

tially prepared for analysis [1] and, with a similarly prepared sample of normal blood and the urine specimens, were forwarded to the office of the chief medical examiner of the state of Maryland for the attention of and analysis by Dr. Charles S. Petty, a pathologist and assistant medical examiner, and Dr. Henry C. Freimuth, a toxicologist in the chief medical examiner's office.

The intravenous (I.V.) bottle, detached and removed on the night of June 30, 1965, sealed with distinctively marked tape, remained in the refrigerator of the hospital medicine room until July 20, 1965. At that time it was removed by a nurse, who testified as to its markings and seal, and delivered to a police officer. The police officer in turn delivered it to Dr. Charles P. Larson, a Tacoma pathologist, who had been called to St. Joseph's Hospital for consultation on the night of June 30, 1965. Dr. Larson examined the markings and seal, locked the bottle in his evidence locker, and on January 19, 1966, delivered it for analysis to Dr. David A. Eagleson, a toxicologist and analytical chemist at the Tacoma General Hospital, who had also been present at the events occurring during the late night and early morning of June 30 and July 1, 1965, respectively, at St. Joseph's Hospital.

Dr. Eagleson testified that his analysis of the fluid in the intravenous bottle, a unit normally sealed with its contents by the manufacturer, although otherwise designed to receive injections of substances supplementary to its original contents, revealed approximately 1.39 milligrams of promazine per 50 cc's of fluid in the bottle. Promazine, otherwise known as sparine, was identified during the trial as a potent tranquilizing drug. Dr. Eagleson testified such a drug was not produced by the manufacturer of the intravenous bottle and its contents.

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1. The preparation referred to was accomplished by separating through a centrifuging process, the respective blood samples into plasma and red blood cell components. The samples of the respective components were in turn marked for identification as units of the original samples.

Dr. Friemuth, the Maryland toxicologist, testified his analysis of the first urine specimen, covering the period from 9:45 p.m., June 30, 1965, to 2 a.m., July 1, 1965, revealed a concentration of free promazine in the quantity of 1 milligram per 100 cc's of fluid, in addition to breakdown products of promazine. He stated that his analysis of the second urine sample, covering the period from 12 o'clock noon to 2:30 p.m., July 2, 1965, indicated no free promazine, but did reveal breakdown products of the drug. He detected no other pertinent toxic substances in the urine samples.

Dr. Petty, the assistant medical examiner of Maryland, testified that comparison tests of the various blood samples were conducted under his supervision and control. He stated that such tests revealed the presence of an anti-cholinesterase agent in Mrs. Boehme's system on the night of June 30, 1965. This agent, he opined, was a drug of the carbamate class. Cholinesterase was described by the evidence as an enzyme, present throughout body tissues, which performs the function of transmitting brain impulses from the nerve circuits to the muscles. The introduction into the body of an anti-cholinesterase agent, under the evidence, thus would have the effect of impeding or arresting the conduction of vital and essential impulses from the brain to the muscular system. Dr. Petty further testified that the tests indicated a significant reduction in Mrs. Boehme's cholinesterase level on the night of June 30th, that brain injury would not cause such a diminishment and that the introduction of promazine into the system would accelerate the effects of any anti-cholinesterase agent then present in Mrs. Boehme's body.

The evidence introduced in support of a motive for the offense charged to the defendant, indicated that Mrs. Boehme was heavily insured and that the defendant was involved in an extramarital affair.

In response to the evidence adduced by the state, the defendant denied any action, effort or wish on his part to poison his wife. He presented testimony to the effect that Mrs. Boehme was emotionally unsettled;

that the tranquilizing drug promazine (sparine) had been prescribed to alleviate her condition; that events occurring during the day of June 29, 1965, unduly disturbed her; that she took an unusually heavy dosage of her tranquilizing drug on June 29th (upwards of 1500 milligrams), a fact which defendant did not discover until the late afternoon of June 30th; that such an overdose would account for the free promazine and the by-products thereof in the urine samples; that immediately following the blow to Mrs. Boehme's head in the boathouse on June 29th, defendant administered a hip injection of 1/6th of a grain of morphine to relieve her pain; that the introduction of eye drops with dilating propensities at the hospital in Bremerton was inadvertent and not immediately known to defendant; that when defendant visited his wife in the hospital on the evening of June 30th he asked to be alone with her so that they could pray together; that while alone with her defendant administered a hip injection of 20 milligrams of the drug ritalin, a mild stimulant, to offset the effects of her overdosage of promazine; that although defendant then examined the intravenous bottle he did not put anything into it; that any evidence of promazine in the fluid in the intravenous bottle was explicable only on the basis that it was not adequately guarded between the time of its removal on June 30, 1965, and analysis in January, 1966; that defendant visited his wife around 7 a.m., July 1, 1965, and found her well on the road to recovery, which confirmed his belief that the ritalin he had administered the night before had neutralized the overdose of promazine; that defendant's failure to fully advise the attending physician of the overdose of promazine, the morphine injection, the eye drops, and the ritalin injection was due to oversight, inability to communicate with the doctor, or the unwise choice of alternatives rather than a deliberate act; that Mrs. Boehme's symptoms and the course of her recovery were consistent with and due to a head injury and the other factors involved rather than the result of any type of poisoning by defendant; that defendant was not in need of

money and, although he initially denied and then admitted an affair, the extramarital relationship with another woman was misguided and of no significance; and that defendant and Mrs. Boehme mutually loved, trusted, and respected one another at all times concerned.

In contradiction to the testimony relating to the presence of an anti-cholinesterase agent in any of the blood samples, the defendant presented the testimony of Dr. Charles H. Hine, a physician, toxicologist, and professor of toxicology employed by the University of California and associated with the San Francisco city and county coronor's department. Dr. Hine, in essence, questioned the sufficiency, accuracy, reliability, significance, and credibility of the conclusions drawn and presented by Dr. Petty in relation to the blood tests conducted under Dr. Petty's supervision. Dr. Hine's primary predicates in this respect were the length of time elapsing between the drawing of the blood and its processing, the limited number of samples tested, the differences between cholinesterase enzymes found in plasma and red blood cells, the lability of carbamate drugs in relation to cholinesterase enzymes, the variations in cholinesterase levels between individuals, as affected by different causes, the exactness required in testing, and the susceptibility of laboratory testing techniques to error. In short, Dr. Hine indicated that Dr. Petty's tests and conclusions were not worthy of any significant weight. He did not, however, directly attack the method or manner of testing employed by Dr. Petty.

Dr. Hine also assailed the significance of Dr. Friemuth's findings of promazine and the by-products thereof in the urine samples. This he did upon the basis that the quantities of promazine reportedly found in the urine samples betokened, at best, only a nonpoisonous and otherwise harmless intake of the drug. Dr. Hine further testified that in his opinion Mrs. Boehme's symptoms and course of recovery indicated a head injury rather than any bizarre type of poisoning.

Finally, Mrs. Boehme testified to the effect that she did not believe the defendant attempted to poison or harm her in any way and that she loved and trusted him and expected to continue to live with him as his wife.

Confronted with the foregoing circumstances and testimony, the jury found defendant guilty as charged.

On appeal, defendant makes 26 assignments of error. By way of argument in support of his assignments, defendant groups them into 8 categories. For convenience of discussion, we reduce the categories to 5. Our consideration will therefore revolve about claims of error directed to rulings of the trial court relative to (1) pretrial discovery; (2) physician-patient privilege; (3) admission of certain exhibits; (4) admission of certain medical testimony; and (5) procedural matters.

PRETRIAL DISCOVERY

In this category defendant directs his attention to the trial court's order denying his motion to require the state to furnish him copies of medical reports and the results of blood and urine tests.

The following resume is the pleading background to the pertinent order of the trial court. The information charging defendant with the offense involved was filed September 20, 1965. Arraignment followed on September 21, at which time defendant interposed a motion to make the information more definite and certain or, in the alternative, to require the state to answer specified interrogatories bearing upon the nature of the poison allegedly used and the manner and nature of its administration. The state was directed to answer the interrogatories in basic part, which it did by stating that the poison involved was an anticholinesterase agent and/or promazine administered in the hip of Mrs. Boehme at St. Joseph's Hospital. The defendant then pleaded not guilty and bail was fixed and posted. On or about October 1, 1965, the state served defendant with its list of witnesses, and, on October 11, 1965, defendant filed and served his

motion for production of reports and statements. The motion was couched in all inclusive terms requesting copies of "all written reports received from any doctor, professional, or expert person . . . including reports and discussions of tests performed upon the blood, tissues, parts, fluids, or products of the body of said Mary Boehme." Furthermore, the motion sought divulgance of any oral reports, as well as all laboratory reports regarding pertinent blood, fluid, or tissue tests. The motion came on for hearing and on October 21, 1965, the trial court entered its order providing as follows:

> IT IS HEREBY ORDERED that the plaintiff State of Washington shall state with particularity the disposition of any blood samples, tissues, parts, fluids or products of the body of Mary Boehme drawn or taken from her on or after the 29th day of June, 1965.
>
> IT IS FURTHER ORDERED that it appearing that the defendant has not made a sufficient showing *at this time* that the other material sought by the motion is not available to him by other means, that all of the rest of the defendant's motion is denied. (Italics ours.)

At or about this time Mrs. Boehme, acting through defendant's counsel, in separate civil proceedings, sought and obtained orders from another department of the Superior Court for Pierce County restraining Dr. Durkin and the custodian of the records of St. Joseph's Hospital from divulging or releasing pertinent medical information and documents, and the prosecuting attorney from conferring with certain other medical witnesses. These orders were predicated upon the ground of a claim of the physician-patient privilege by Mrs. Boehme. Following these orders, it appears that various of the medical witnesses listed or expected to be called as witnesses by the state were advised by letter from counsel that Mrs. Boheme intended to claim the full benefit of her privilege as to any confidential information they might possess or divulge. From and after the trial court's order of

October, 21, and the civil proceedings, it does not appear from the record that defendant renewed his motion for the production of any documents, reports or laboratory tests in the possession of the prosecution before the trial commenced on January 24, 1966.

At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a two-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. *State v. Robinson,* 61 Wn. 2d 107, 377 P.2d 248 (1962); *State v. Gilman,* 63 Wn. 2d 7, 385 P.2d 369 (1963); *State v. Peele,* 67 Wn.2d 893, 410 P.2d 599 (1966).

In view of all of the circumstances appearing, including the fact that the trial court's order contained an inherent invitation to defendant to renew his motion and present a more adequate showing of necessity, we are convinced this claim of error falls squarely within the ambit of our holding in *State v. Mesaros,* 62 Wn.2d 579, 384 P.2d 372 (1963), wherein we said at 587:

> There appears to be a growing tendency, not only in this state, but in other jurisdictions as well, to liberalize the right of a defendant to discovery in criminal cases. See *Powell v. Superior Court,* 48 Cal. (2d) 704, 312 P. (2d) 698 (1957), and *Walker v. Superior Court,* 155 Cal. App. (2d) 134, 317 P. (2d) 130 (1957). The *Thompson* case would appear to follow the same philosophy and reasoning, but it must be remembered that all of these cases are based upon the same fundamental rule that the granting or denial of a defendant's motion for discovery rests within the discretion of the trial court and will not be dis-

turbed in the absence of a manifest abuse of discretion.

> In the instant case, the court granted a portion of appellant's motion for inspection and reserved the right to him to renew this motion on a further showing of necessity. Although he prepared an additional motion, he failed to present it to the court. In other words, the court opened the door to him but he failed to enter. There is no way that this court or anyone else can now discover what the court's ruling might have been, had this motion been further urged and proper showing made in support of it. The court was not given an opportunity to exercise its discretion, although the record indicates a liberal and fair attitude. Under the circumstances of this case, we find no error in the court's failure to grant further discovery.

We so hold in this case.

PHYSICIAN-PATIENT PRIVILEGE

As indicated in our discussion under the preceding category, it became apparent early in the course of this case that Mrs. Boehme intended to claim the physician-patient privilege as to information gained by the physicians and hospital personnel who attended her between June 29 and July 16, 1965. This she did through defendant's counsel acting on her behalf, both by way of civil actions seeking to restrain their testimony as well as asserting the privilege at defendant's trial.

The trial court denied Mrs. Boehme's claim of privilege and overruled defendant's objections to the pertinent testimony. Defendant assigns error, contending that the trial court's action abrogates the privilege and/or constitutes an invasion of Mrs. Boehme's constitutional right of privacy.

We cannot agree with defendant.

At common law, no testimonial privilege existed between patient and physician as to communications or

information passing between them. The privilege, as we accept it today is the creature of statute, and as such is a procedural safeguard rather than a rule of substantive or constitutional law. The applicability, therefore, of the privilege in a given situation turns upon the language and interpretation of the pertinent statutory provisions.

In this state, the significant statutory provisions are RCW 5.60.060(4), 10.58.010, and 10.52.020, which respectively provide:

> A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof. RCW 5.60.060(4).
>
> The rules of evidence in civil actions, *so far as practicable,* shall be applied to criminal prosecutions. RCW 10.58.010. (Italics ours.)
>
> Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; . . . RCW 10.52.020.

The judicially proclaimed purpose of statutes such as ours, establishing the privilege, is to surround communications between patient and physician with the cloak of confidence, and thus allow complete freedom in the exchange of information between them to the end that the patient's ailments may be properly treated. *State v. Miller,* 105 Wash. 475, 178 Pac. 459 (1919).

In the last cited case (*State v. Miller, supra*), we construed the foregoing statutes to mean that the

privilege provided by RCW 5.60.060(4) was, by virtue of RCW 10.58.010, extended to criminal prosecutions, in the sense that a defendant, standing charged with a crime, could claim and assert the privilege as to the testimonial knowledge of a physician acquired in the course of professionally treating such defendant. Despite the fact that our sister states of California,[2] Oregon,[3] Idaho,[4] Montana,[5] and Utah[6] have otherwise applied analogous statutory provisions, we have steadfastly adhered to our ruling in the *Miller* case. *State v. Sullivan,* 60 Wn.2d 214, 373 P.2d 474 (1961); *State v. McCoy,* 70 W.D.2d 935, 425 P.2d 874 (1967).

We have, however, refused to permit an accused person to claim the privilege arising between an *examining* physician and the victim of the accused person's crime. *State v. Winnett,* 48 Wash. 93, 92 Pac. 904 (1907); *State v. Thomas,* 1 Wn.2d 298, 95 P.2d 1036 (1939); *State v. Fackrell,* 44 Wn.2d 874, 271 P. 2d 679 (1954). Although none of these cases dealt directly with the right of an accused to claim the privilege arising between the victim and his or her *treating* physician, we did note in the *Fackrell* case, at 878, that

> The former decisions of this court fit into the rationale of the majority rule set forth by R. P. Davis in an annotation entitled "Right of one against whom testimony is offered to invoke privilege of communication between others," appearing in 2 A.L.R. (2d) at 647, wherein it is said:
>
> "The weight of authority supports the view that the doctrine of privileged communications as between physician and patient, usually incorporated in statutory enactments, is intended for the

2. *People v. Gonzales,* 182 Cal. App. 2d 276, 5 Cal. Rptr. 920 (1960).

3. *State v. Betts,* 235 Ore. 127, 384 P. 2d 198 (1963).

4. *State v. Bounds,* 74 Idaho, 136, 258 P. 2d 751 (1953); *State v. Coburn,* 82 Idaho 437, 354 P. 2d 751 (1960).

5. *State v. Campbell,* 146 Mont. 251, 405 P. 2d. 978 (1965).

6. *State v. Dean,* 69 Utah, 268, 254 Pac. 142 (1927).

> benefit of the patient, and that the defendant in a criminal prosecution has no right to object to the testimony of a physician concerning communications made by the victim of the crime to such physician, or information gained from the victim by the physician, in his professional capacity."

We find no reason asserted in our cases, in our application of our statutory provisions, or in the statutory provisions themselves which would require a departure or a deviation from the majority rule recognized and cited in the *Fackrell* case.

Accordingly, we hold that the defendant could not assert the doctor-patient privilege flowing to Mrs. Boehme as the patient and asserted victim of the alleged crime.

This, then, leaves the question of the efficacy of Mrs. Boehme's claim, as patient-victim, of the privilege.

In this respect, it is generally recognized and accepted that the privilege is essentially one intended for the benefit of the patient, and is one personal to the patient. *State v. McCoy, supra.* This approach is in keeping with the underlying purpose of the privilege, that is, to facilitate and safeguard a free exchange of information in the course of treatment. A further purpose has also been occasionally noted — that of protecting the patient from embarrassment, scandal, or incrimination which might flow from the revelation of intimate details connected with the medical treatment of physical ills. These purposes are benevolent and wholesome. They fully warrant and justify the privilege in appropriate cases.

The privilege, however, should be fairly limited to its purposes. Absent the most cogent of reasons, it should not, by unrealistic or impractical application, become a means whereby criminal activities of third persons may be shielded from detection, prosecution, and punishment, however magnanimous, compassionate or conciliatory the victim might otherwise wish to be. To allow the privilege to thus become a device

by which the victim of an attempted crime could, without a civically paramount reason, thwart the course of a criminal proceeding against the perpetrator might well promote greater evils than the privilege was designed to avoid. The maintenance of an orderly society, and the circumvention of criminal activities, are functions of government which should not be subject to casual suppression by the operation of a procedural rule primarily designed for the purpose of aiding in the healing of physical ailments. *Cf. People v. Lay,* 254 App. Div. 372, 5 N.Y.S. 2d 325 (1938), *aff'd* 279 N.Y. 737, 18 N.E.2d 686 (1939); *Wimberly v State,* 217 Ark. 130, 228 S.W.2d 991 (1950); *State v. Antill,* 176 Ohio St. 61, 197 N.E.2d 348 (1964).

In the instant case, we can conceive of little additional embarrassment or humiliation visited upon Mrs. Boehme by virtue of admission of the challenged evidence than that occasioned by the bringing of the charges in the first instance. Likewise, the testimony of the treating physicians and/or hospital personnel by no manner of means subjected her to any form of criminal liability. Moreover, we cannot visualize any significant public interest which would be served by foreclosing a full judicial investigation of the charges here preferred.

Bearing in mind that the legislature, by RCW 10.58.010, in effect, attached a condition of practicality to the application of the physician-patient privilege in criminal prosecutions, we conclude that the trial court did not err in overruling Mrs. Boehme's claim of the privilege under the circumstances prevailing in the instant case.

ADMISSION OF CERTAIN EXHIBITS

By his assignments of error falling into this category, defendant challenges the admission into evidence of the blood and urine samples and the intravenous bottle with its contents. In this vein, he argues that the state failed to sufficiently establish the identity of the exhibits, the chain of custody through which they passed, and the freedom from possible contamination.

We find no reversible error within the framework of defendant's contentions.

The applicable rule, distilled from a pertinent annotation in 21 A.L.R. 2d 1216 (1952) and later cases, is succinctly summarized in 29 Am. Jur. 2d *Evidence* § 775 (1967) at 845:

> When objects, such as bullets, specimens, or parts taken from a human body, are produced in court and used there as an exhibit or made the basis for the testimony or report of an expert or officer, the identity of the object produced with the object taken from the body must be proved. Proof of this identity involves showing that the thing was taken from the particular body from which it was supposed to be taken, and that thereafter it was properly kept and, if necessary, transported and delivered to the one who produced it at the trial or the expert who analyzed or examined it.

Our review of the evidence presented satisfies us that the state fully complied with the requirements of the rule. Without detailing the testimony, it is sufficient to say that the state, through the testimony of the participating hospital, medical, and law enforcement personnel, methodically traced the identity, markings, custody, storage, preparation, and transportation of the respective samples and specimens from Mrs. Boehme's body and hospital room to the hands of the analyst. Time factors, and the potential effect thereof upon ultimate analysis, were fully explored and explained by the competing experts. And, beyond mere speculation and innuendo, there is not the least indication in the evidence that the questioned exhibits were anything other than what they were represented to be or that they were contaminated in the course of their journey to the testing laboratory.

The trial court did not err in admitting them into evidence. The weight to be accorded to the exhibits was for the jury.

ADMISSION OF CERTAIN MEDICAL TESTIMONY

Defendant, by his assignments of error in this category, focuses attention upon the results of the chemical tests performed on the blood samples, as related by Dr. Petty, the Maryland pathologist.

In this regard, the testimony essentially reveals that after the respective samples came into his possession Dr. Petty and his assistant, a graduate chemist, working together in their laboratory facility, prepared the samples for analysis by the titrimetric or titration method. Thereafter, Dr. Petty's assistant took the prepared samples to a second laboratory, which, by the terms of a contract existing over a number of years, made available an automatic titrating machine for Dr. Petty's use. At this point, Dr. Petty's assistant placed or participated in placing the samples in the machine, observed the operation of the machine, recorded the outcome, and returned with the information to Dr. Petty's laboratory. There, Dr. Petty and his assistant correlated and compared the data with data from control samples, evaluated the analysis and determined the final result of the tests. Dr. Petty testified that his assistant was subject to his direction and that the process of analysis was under his supervision and control. Although a defendant's expert, Dr. Hine, stressed the need for accuracy, he did not directly criticize the procedure or method of testing employed by Dr. Petty.

Defendant's assignments of error arise out of the fact that Dr. Petty's assistant was not called as a witness and Dr. Petty did not personally observe the operation of the automatic titration machine. The epitome of the contentions is concisely expressed in the following excerpt from defense counsel's objection to the challenged testimony during trial:

> In fairness to the witness, I believe he stated the tests were performed under his supervision, and the issue that I was making is that super-

> vision is not sufficient unless it includes observation, ...

We were confronted with a similar challenge in the case of *State v. Rutherford,* 66 Wn.2d 851, 405 P.2d 719 (1965). After analogizing the situation there presented to the Uniform Business Records Act, RCW 5.45.020, and the underlying purposes of that act, we discussed and distinguished the principal cases relied upon by defendant (*State v. Baker,* 56 Wn.2d 846, 355 P.2d 806 (1960) and *Seattle v. Bryan,* 53 Wn.2d 321, 333 P.2d 680 (1958)) and stated at 855:

> We conclude that the trial court did not abuse its discretion in permitting the witness to give the results of tests performed under his supervision and control, even though he did not personally conduct the tests or witness their performance.

Although we cannot, under the circumstances of this case, applaud or commend the state's failure to call Dr. Petty's assistant as a witness, we are not persuaded that the trial court committed reversible error in admitting Dr. Petty's testimony.

PROCEDURAL MATTERS

The errors assigned by defendant in this category are directed to (a) a trial amendment of the information, (b) the giving of instructions embracing the matter contained in the trial amendment, (c) defendant's challenge to the sufficiency of the evidence, (d) newly discovered evidence bearing upon the credibility of a witness, (e) evidence suggesting prejudice on the part of a juror, and (f) the publicity attendant upon the charges and the trial. Defendant contends the claimed errors individually and/or cumulatively deprived him of due process of law and a fair trial.

It would unduly prolong this opinion to discuss each claim of error in detail. Suffice it to say we have carefully reviewed and evaluated the various assignments standing alone and in the aggregate and are not persuaded that any reversible error flows therefrom. Defendant was competently, intelligently and

energetically represented at all stages of the proceeding. The character, nature, and extent of the evidence presented in his defense reflects ample prtrial information and preparation. All significant procedural and technical issues presented were countered. The publicity attendant upon the case cannot be equated with that found in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed. 2d 600, 86 Sup. Ct. 1507 (1966). Post trial matters were carefully considered and weighed by the trial court and we find no basis warranting the substitution of our judgment in these matters for that of the trial court. The evidence presented by the state, if believed by the jury, was ample to sustain the verdict.

We conclude that defendant received a fair trial and was accorded due process of law.

The judgment is affirmed.

HAMILTON, *J.*

We Concur:
FINLEY, *C.J.*
HILL, *J.*
DONWORTH, *J.*
WEAVER, *J.*
ROSELLINI, *J.*
HUNTER, *J.*
BARNETT, *J. Pro Tem.*

APPENDIX B

CONSTITUTIONAL PROVISIONS

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . "

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

Ninth Amendment

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROVISIONS OF THE CONSTITUTION OF THE STATE OF WASHINGTON

Amendment 10

Art. 1 § 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [1921 p 79 § 1. Approved November, 1922.]

APPENDIX C

STATUTORY PROVISIONS

REVISED CODE OF WASHINGTON (RCW)

Chapter 5.45: Uniform Business Records as Evidence Act.

5.45.010 "Business" defined. The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

5.45.020 Business records as evidence. A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

5.60.060 Who are disqualified—Privileged communications. The following persons shall not be examined as witnesses:

(1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

* * * *

(4) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient.

9.11.010 Assault in the First Degree Defined—How Punished. Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another. . . .

(2) Shall administer to or cause to be taken by another, poison or any other destructive or noxious thing so as to endanger the life of another person, shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years.

10.52.020 Competency—Generally. Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; * * *

Chapter 10.55: Witnesses Outside the State (Uniform Act)

* * * *

10.55.060 Witness from another state summoned to testify in this state. If any person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness either for the prosecution or for the defense, in a criminal action pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Chapter 10.58: Evidence

10.58.010 Rules—Generally. The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions.

APPENDIX D

RULE OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON

RULES OF PLEADING, PRACTICE AND PROCEDURE (RPPP)

* * * *

RULE 101.04W. CRIMINAL PROCEDURE

* * * *

(2) At any time before or during trial the court may permit the amendment of an information and permit proof to be offered in support thereof, and if the defendant shows to the satisfaction of the court that he would thereby be misled, the court shall make such order as shall secure to the defendant full opportunity to defend. An information shall be considered amended to conform to the evidence introduced without objection in support of the crime substantially charged therein, unless the defendant would thereby be prejudiced in a substantial right.

CRIMINAL RULES FOR SUPERIOR COURT (Cr R)

* * * *

RULE 101.04W. CRIMINAL PROCEDURE—MISCELLANEOUS

* * * *

(b) Amendment of Information. At any time before or during trial, the court may permit the amendment of an information and permit proof to be offered in support thereof. If the defendant shows to the satisfaction of the court that he is misled by the amendment, the court shall make such order as will secure to the defendant full opportunity to defend. An information shall be considered amended to conform to the evidence introduced without objection in support of the crime substantially charged therein, unless the defendant is prejudiced in a substantial right.